SUPREME COURT U. S.

IN THE

Supreme Court of the United States

October Term, 1969

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No. 370

GEORGE E. FARRELL, as Administrator de bonis non of the Estate of WYAND F. DOERNER, JR., deceased,
DIANE SOKOLOWSKI, as Administratrix of the Estate of GEORGINA LOPEZ BURDEN, deceased,
JULES BRODY, as Administrator with will annexed of the Estate of WASHINGTON LAFAYETTE BLACKMON, JR., deceased,
DANIEL DONNELLY, as Administrator de bonis non, cum testamento annexo of the Estate of J. DUDLEY HUTCHINSON, deceased,
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ANDREW P. O'ROURKE, as Administrator of the Estate of C. L. HUTCHERSON, JR., deceased,
GERALD A. ROBBIE, as Administrator de bonis non with will annexed of the Estate of JOSEPH EMILE BERMAN, deceased,
PAUL S. EDELMAN, as Administrator de bonis non with will annexed of the Estate of ELLEN S. LOVE, deceased,
PAUL S. EDELMAN, as Administrator of the Estate of LUCY ANN LOVE, deceased,
PAUL S. EDELMAN, as Administrator of the Estate of ELLEN CABOT LOVE, deceased,
PAUL S. EDELMAN, as Administrator of the Estate of WILLIAM D. LOVE, V, deceased,
AMERICAN BANK & TRUST COMPANY, as Administrator cum testamento annexo of the Estate of JAMES HENRY STUART, deceased, and
AMERICAN BANK & TRUST COMPANY, as Administrator cum testamento annexo of the Estate of THOMAS C. WHITE, deceased,

Petitioners,

against

PIEDMONT AVIATION, INC., THE BOEING COMPANY, and UNITED STATES OF AMERICA,

Defendants,

and

RAPIDAIR, INC., and LANSEAIR, INC.,

Respondents.

BRIEF OF RESPONDENT RAPIDAIR, INC. AND GARNISHEE ST. PAUL FIRE AND MARINE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	3
ARGUMENT	8
POINT I—Interpretation of Local Law is ordinarily not reviewed by the Supreme Court	9
POINT II—The decisions below are clearly correct	9
POINT III—If the attachment is allowed it would be unconstitutional as a violation of due process and as an impairment of contract	15
A. The attachment violates due process	16
B. The attachment impairs the obligation of the insurance contract	19
CONCLUSION	24

TABLE OF AUTHORITIES

Cases:

Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P. 2d 960 (1957), appeals dismissed and cert. denied sub nom. Columbia Broadcasting System, Inc. v. Atkinson, 357 U. S. 569	17
Bernhardt v. Polygraphic Co., 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199 (1955)	9

PAGE

Columbia Railway Gas & Electric Co. v. State of South Carolina, 261 U. S. 236, 43 S. Ct. 306, 67 L. Ed. 629 (1923) 21
Commissioner of Internal Revenue v. Estate of Bosch, 387 U. S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967) 9, 13

Davenport v. Patrick, 227 N. C. 686, 44 S. E. 2d 203 (1947) 12
Douglas v. New Haven R. Co., 279 U. S. 377, 49 S. Ct. 355, 73 L. Ed. 747 (1929) 14

Farrell v. Wyatt, 408 F. 2d 662 (2d Cir. 1969) 7
Fidelity Union Trust Co. v. Field, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940) 13

Hanson v. Denckla, 357 U. S. 235, 78 S. Ct. 1228, 2 L. Ed. 1283 (1958) 14, 18
Harris v. Balk, 198 U. S. 215, 25 S. Ct. 625, 49 L. Ed. 1023 (1905) 16
Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178 (1934) 22, 23
Home Insurance Co. v. Dick, 281 U. S. 397, 50 S. Ct. 338 74 L. Ed. 926 (1930) 18, 22
Houston & Texas R. R. Co. v. Texas, 177 U. S. 66, 20 S. Ct. 545, 44 L. Ed. 673 (1900) 21

In re Ives Estate, 248 N. C. 176, 102 S. E. 2d 807 (1958) 12
International Shoe Co. v. Washington, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945) 19

Mac Gregor v. State Mutual Life Assurance Co., 315 U. S. 280, 62 S. Ct. 607, 86 L. Ed. 846 (1942) 9

PAGE

McGee v. International Life Insurance Co., 355 U. S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957) 19
Minichiello v. Rosenberg, 410 F. 2d 106 (2nd Cir. 1968) 11, 12, 14, 16, 19
Missouri *ex rel.* Southern Railway Co. v. Mayfield, 340 U. S. 1, 71 S. Ct. 1, 95 L. Ed. 3 (1950) 14

Pierson v. Ray, 386 U. S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) 9

Seider v. Roth, 17 N. Y. 2d 111 (1966) 10, 11, 13, 14, 15, 16, 21
Simpson v. Loehmann, 21 N. Y. 2d 305 (1967), motion for reargument denied 21 N. Y. 2d 990 (1968) 10, 13, 17
Six Companies of California v. Joint Highway Dist. No. 13, 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 114 (1940) 13
Steele v. General Mills, Inc., 329 U. S. 433, 67 S. Ct. 439, 91 L. Ed. 402 (1947) 9
Stoner v. New York Life Insurance Company, 311 U. S. 464 61 S. Ct. 336, 85 L. Ed. 284 (1940) 13

Vaage v. Lewis, 29 A. D. 315, 288 N. Y. S. 2d 521 (Second Dept. 1968) 10, 11, 13, 14

Watson v. Employers Liability Corp., 348 U. S. 66, 75 S. Ct. 166, 99 L. Ed. 74 (1954) 18
West v. American Telephone & Telegraph, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139 (1940) 13

Statutes and Other Authorities:

N. Y. C. P. L. R. 6214 (b) 19, 20
U. S. Constitution, Article I, Section 10 23
28 U. S. C. §1254(1) 2

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Respondent Rapidair, Inc., and garnishee St. Paul Fire and Marine Insurance Company (hereinafter referred to as St. Paul) submit this brief in opposition to the petition filed by petitioners for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Citations to Opinions Below

The opinion of the United States Court of Appeals (Pet. App. B) has not as yet been reported. The opinion of the United States District Court for the Southern District of New York is reported at 295 F. Supp. 228.

Jurisdiction

The jurisdiction of this Court has been invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Under New York law may *quasi in rem* jurisdiction over a non-resident defendant be obtained by attachment of said defendant's liability insurance policy in an action brought by a nominal New York plaintiff for the benefit of a non-resident to recover damages for an out-of-state tort?

2. If the answer to Question No. 1 is in the negative, does the refusal of New York to entertain a lawsuit based upon such an attachment contravene the privileges and immunities and equal protection provisions of the United States Constitution?

3. If the answer to Question No. 1 is in the affirmative, does such an attachment violate due process or constitute an impairment of the insurance contract in violation of the United States Constitution?

Statutes Involved

The pertinent provisions of the New York Civil Practice Law and Rules are set forth in Appendix A of the petition.

Statement

This is an action to recover for the alleged wrongful deaths of thirteen decedents (non-residents of the State of New York) who were killed on July 19, 1967, as a result of a mid-air collision between a Piedmont Aviation Boeing 727 aircraft and a Lanseair Cessna 310 aircraft near Hendersonville, North Carolina. *Quasi in rem* jurisdiction over Rapidair, who is alleged to have been operating the Lanseair aircraft at the time of the collision, and Lanseair was attempted by attachment of their respective aircraft liability insurance policies. On November 27, 1968, the Honorable Inzer B. Wyatt vacated said attachments on the ground that the *quasi in rem* attachment procedure was not available in an action for the benefit of non-residents of the State of New York, set aside the service of process, and directed that judgments be immediately entered in favor of defendants Rapidair and Lanseair. The Court of Appeals for the Second Circuit, in a unanimous opinion, affirmed the District Court.

On July 19, 1967, a Boeing 727 aircraft being operated as Flight 22 by Piedmont Aviation, Inc., departed the

Asheville, North Carolina, airport en route to Roanoke, Virginia. Shortly after takeoff from Asheville, Flight 22 collided near Hendersonville, North Carolina, with a Cessna 310 aircraft that was inbound to Asheville from Charlotte, North Carolina. At the time of the collision the Cessna 310 was owned by Lanseair, Inc., and was being operated by Lanseair on company business. It is alleged that at the time of said collision, the pilot operating the Lanseair aircraft was in the employ of Rapidair.

As a result of said collision, Wyand F. Doerner, Jr., Georgina Lopez Burden, Washington Lafayette Blackmon, Jr., J. Dudley Hutchinson, J. Dudley Hutchinson, Jr., C. L. Hutcherson, Jr., Joseph Emile Berman, Ellen S. Love, Lucy Ann Love, Ellen Cabot Love, William D. Love, V, James Henry Stuart, and Thomas C. White, all of whom were passengers on the Piedmont aircraft, were killed. At the time of their demise, decedents Doerner and Burden were residents and citizens of Maryland; decedent Blackmon was a resident and citizen of Texas; decedents Hutchinson, Hutchinson, Jr., Hutcherson, Berman, Ellen S. Love, Lucy A. Love, Ellen C. Love and William D. Love, V, were residents and citizens of Mississipi and decedents Stuart and White were residents and citizens of Tennessee.

Respondents Lanseair and Rapidair are Missouri corporations with their principal places of business in Missouri. Defendant Piedmont Aviation is a North Carolina corporation with its principal place of business in North Carolina. Defendant Boeing is a Delaware corporation with its principal place of business in the State of Wash-

ington. At the time of the accident, Rapidair was insured by St. Paul Fire and Marine Insurance Company, a Minnesota corporation with its principal place of business in Minnesota. The St. Paul policy was issued by its agent in Illinois and delivered to Rapidair in Missouri.

Decedents Blackmon, Hutchinson, Hutchinson, Jr., Berman, Ellen S. Love, Stuart and White died testate and executors for their estates were duly appointed by the appropriate probate courts. Prior to the institution of this lawsuit, all of the original executors of the aforementioned estates resigned their positions and requested the appointments of the present plaintiff-administrators.

Decedents Doerner, Burden, Hutcherson, Lucy A. Love, Ellen C. Love and William D. Love, V, all died intestate. Prior to the institution of this lawsuit, the original administratix of the Doerner estate resigned her position and requested the appointment of the present plaintiff-administrator. All of the other plaintiff-administrators were nominated by the decedents' next-of-kin.

All of the petitioners in this case, except for the American Bank & Trust Company, are employees, former employees or members, of the firm of Kreindler & Kreindler, attorneys for petitioners. All of the petitioners are residents and citizens of the State of New York.

The instant action was commenced on or about June 21, 1968, when petitioners obtained an order of attachment which directed the U. S. Marshal for the Southern District of New York to levy upon the contractual obligation

of United States Aviation Underwriters, Inc., and/or United States Aircraft Insurance Group "to defend and indemnify defendant Rapidair, Inc. under a policy of aircraft liability insurance issued by it to said Rapidair, Inc." After the levy had been made by the U. S. Marshal, United States Aviation Underwriters, Inc., and United States Aircraft Insurance Group filed a Garnishee's Statement in which they stated that neither insured Rapidair, Inc., and that St. Paul Fire and Marine Insurance Company was Rapidair's aircraft liability insurer.

Petitioners thereupon obtained *ex parte* on July 9, 1968, a supplemental order of attachment directing the U. S. Marshal to levy upon the contractual obligation of St. Paul Fire and Marine Insurance Company "to defend and indemnify defendant Rapidair, Inc. under a policy of aircraft liability insurance issued by it to said Rapidair, Inc." The U. S. Marshal subsequently levied upon the St. Paul policy on or about July 10, 1968. Service of process was then perfected on Rapidair, Inc., in Springfield, Missouri, on or about July 17, 1968.

Jurisdiction as to the corporate defendants is based upon diversity of citizenship, and as to defendant United States of America jurisdiction is based upon the Federal Tort Claims Act.

On September 5, 1968, Rapidair and garnishee St. Paul Fire and Marine Insurance Company moved to vacate the attachment, to set aside the service of process and to dismiss the complaint as to defendant Rapidair.

On November 27, 1968, Judge Wyatt rendered his opinion vacating the attachment of Rapidair's aircraft liability insurance policy, setting aside the service of process on Rapidair, and directing that judgment be immediately entered in favor of Rapidair. On November 27, 1968, Judge Wyatt also rendered an opinion transferring this case to the United States District Court for the Western District of North Carolina, pursuant to Title 28, United States Code, Section 1404 (a).

On December 2, 1968, a judgment was entered in favor of Rapidair, Inc., and on December 5, 1968, the file herein was mailed to the Clerk of the United States District Court for the Western District of North Carolina (Asheville Division), where it was received on or about December 10, 1968.

On December 27, 1968, petitioners filed their notice of appeal appealing from Judge Wyatt's order of November 27, 1968, which vacated the attachment of Rapidair's liability insurance policy, and from the judgment entered in favor of Rapidair pursuant to said order.

On or about February 6, 1969, petitioners also filed a petition for a writ of mandamus and/or prohibition challenging Judge Wyatt's order of November 27, 1968, transferring this action to the United States District Court for the Western District of North Carolina.

On March 18, 1969, the Court of Appeals for the Second Circuit denied the petition for a writ of mandamus (*Farrell v. Wyatt*, 408 F. 2d 662), and on April 29, 1969, affirmed the orders and judgments of the District Court

vacating the attachments as to respondents Rapidair and Lanseair.

On or about June 9, 1969, petitioners filed a motion and petition in this Court for a writ of mandamus and/or prohibition to the United States District Court for the Southern District of New York and the Honorable Inzer B. Wyatt, to vacate the order of November 27, 1968, which transferred this action to the United States District Court for the Western District of North Carolina (No. 2300 Misc. Oct. Term, 1969).

On or about July 23, 1969, the petitioners filed in this Court a petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit, entered on April 29, 1969, affirming judgments of the United States District Court for the Southern District of New York.

Argument

The petition for writ of certiorari should be denied because the issue presented by the petitioners herein seeks only an interpretation of local New York law which is ordinarily not reviewable by this Court; the law of New York was properly applied by the District Court and the Court of Appeals; and if the attachment herein should be reinstated as petitioners contend, it would violate due process and impair the obligations of the insurance contract between Rapidair, Inc., and St. Paul Fire and Marine Insurance Company.

POINT I

Interpretation of Local Law is ordinarily not reviewed by the Supreme Court.

An examination of the petition reveals that petitioners' basic argument herein is that the District Court and the Court of Appeals misinterpreted the New York attachment statute. It has been well established that this Court does not ordinarily review the holdings of lower courts on matters of interpretation of state law. *Commissioner of Internal Revenue* v. *Estate of Bosch,* 387 U. S. 456, 462, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967); *Pierson* v. *Ray,* 386 U. S. 547, 558 fn. 12, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967); *Bernhardt* v. *Polygraphic Co.,* 350 U. S. 198, 204-5, 76 S. Ct. 273, 100 L. Ed. 199 (1955); *Steele* v. *General Mills, Inc.,* 329 U. S. 433, 438-9, 67 S. Ct. 439, 91 L. Ed. 402 (1947); *MacGregor* v. *State Mutual Life Assurance Co.,* 315 U. S. 280, 62 S. Ct. 607, 86 L. Ed. 846 (1942). The decisions of the lower courts, sitting in New York, were based upon their interpretation of the local New York law and involved no constitutional issues.

POINT II

The decisions below are clearly correct.

Both the District Court and the Court of Appeals held that the attachment of a non-resident defendant's insurance policy in order to confer *quasi in rem* jurisdiction on a New York court in an action brought to recover damages on behalf of non-residents injured as a result of an out-of-

state tort was not permissible under the New York case decisions interpreting the New York attachment statute. This interpretation of New York law is clearly correct.

The applicable New York law may be found in three decisions: *Seider* v. *Roth,* 17 N.Y. 2d 111 (1966); *Simpson* v. *Loehmann,* 21 N.Y. 2d 305 (1967), motion for rearg. den. 21 N.Y. 2d 990 (1968), and *Vaage* v. *Lewis,* 29 A. D. 2d 315, 288 N.Y.S. 2d 521 (Second Dept. 1968). It is clear from an analysis of *Seider, Simpson,* and *Vaage* that the procedural device of obtaining *quasi in rem* jurisdiction over a non-resident defendant by attachment of his liability insurance policy is for the purpose of protecting New York State residents injured in out-of-state accidents and is not available to non-residents.

In *Vaage* v. *Lewis,* 29 A. D. 2d 315, 288 N.Y.S. 2d 521 (Second Dept. 1968), the defendants' insurance carrier was doing business in the State of New York, but the injured plaintiff was not a New York resident. In a unanimous opinion, the Appellate Division for the Second Department, in vacating the attachment and dismissing the complaint, held:

> "A close reading of *Seider* and *Simpson* and the commentaries on those cases shows that the New York residency is a crucial consideration * * *
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> * * *
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> "The plaintiff is a nonresident. The solitary nexus for the New York courts is the fact that the defendants' insurance carrier is a foreign corporation authorized to do business in New York. Under no circumstances could these facts support an exercise of jurisdiction by the New York courts without adversely

affecting the administration of justice in this State by an influx here of unwanted and unnecessary lawsuits (*Pietrarcia* v. *New Jersey & Hudson Riv. Ry. & Ferry Co.*, 197 N.Y. 434). We are obliged under the circumstances of this case, where no special considerations are advanced, to dwell on the aptness of the forum non conveniens doctrine. Essentially, it is the convenience of our courts, not that of the litigants, and the practical ramifications which determine the acceptance or rejection of the doctrine in a particular case (*Williams* v. *Seaboard Air Line R. R. Co.*, 9 A D 2d 268; see, also, *Gilchrist* v. *Trans-Canada Air Lines*, 27 A D 2d 524). For this compelling reason, and also because we believe that an exercise of jurisdiction in this case would deprive the defendants of basic due process (*Hanson* v. *Denckla*, 357 U. S. 235; see *Lefcourt* v. *Sea Crest Hotel & Motor Inn*, 54 Misc. 2d 376), the order shold be reversed, on the law, without costs, and the defendants' motion granted." 29 A. D. 2d at 316, 318.

The *Vaage* case, so far as appears, was never appealed to the New York Court of Appeals, so that the opinion of the Appellate Division stands as the law of New York.

The unavailability of the *Seider* attachment procedure to non-residents of the State of New York was recognized by the Court of Appeals for the Second Circuit in *Minichiello* v. *Rosenberg*, 410 F. 2d 106, wherein Judge Friendly wrote:

"We thus believe that, all things considered, the Supreme Court would sustain the validity of a state statute permitting direct actions against insurers doing business in the state in favor of residents as well as on behalf of persons injured within it. * * * Since, on the other hand, we doubt that the Court

> would sanction a direct action statute where the state was neither the place of injury nor the plaintiff's residence, we equally doubt whether *Seider* could validly be applied in such a case." 410 F. 2d at 110.

And in a concurring opinion to the *en banc* decision, Judge Hays stated:

> "Although I read Judge's Friendly's opinion as finding the *Seider* procedure acceptable only when plaintiffs are residents of New York, I believe that it is worthwhile to put additional stress on this point and to make it completely clear that our opinion refers only to the situation where plaintiffs are New York residents." 410 F. 2d at 120.

While it is true that the present plaintiff-administrators are residents and citizens of the State of New York, their presence herein is contrieved and is a subterfuge. The decedents and their next-of-kin were all non-residents. The original personal representatives were non-residents. New York State residency was deliberately created in this lawsuit. Furthermore, the petitioners herein are only nominal parties. They have no interest in the outcome of this litigation. As personal representatives they prosecute this action as mere statutory trustees, suing for the benefit of each decedent's next-of-kin. *Davenport* v. *Patrick*, 227 N.C. 686, 44 S.E. 2d 203 (1947); *In re Ives Estate*, 248 N.C. 176, 102 S.E. 2d 807 (1958).

In an attempt to inject some constitutional argument in order to justify the filing of the petition for a writ of certiorari, petitioners have argued (1) that the lower courts did not follow their constitutional obligation in

diversity cases and apply the New York law as it exists, which in the opinion of petitioners does not differentiate between residency and non-residency in the attachment of liability insurance policies in order to confer *quasi in rem* jurisdiction, and (2) that if the attachment procedure is unavailable because of non-residency, the constitutional rights of the petitioners under the Privileges and Immunities and Equal Protection clauses of the United States Constitution have been violated.

Petitioners' argument that the lower courts did not follow the decisions of the New York courts is simply erroneous. The emphasis in both the *Seider* and *Simpson* decisions was on the protection to be afforded New York residents. If *Seider* and *Simpson* were unclear, *Vaage* v. *Lewis,* 29 A. D. 2d 315, 288 N.Y.S. 2d 521 (Second Dep't 1968), was explicit: a non-resident injured in an out-of-state accident could not avail himself of a *Seider* attachment in order to confer on a New York court *quasi in rem* jurisdiction over a non-resident defendant. Where the state law is clear, even though it may have been declared by an intermediate appellate court, the federal courts are obligated to follow and apply that law in diversity cases. *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940); *Stoner* v. *New York Life Ins. Co.,* 311 U. S. 464, 61 S. Ct. 336, 85 L. Ed. 284 (1940); *Six Companies of California* v. *Joint Highway Dist. No. 13,* 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 114 (1940); *West* v. *American Telephone & Telegraph Co.,* 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139 (1940); *Commissioner of Internal Revenue* v. *Estate of Bosch,* 387 U. S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967). The New York law as to attachment

of liability insurance policies to confer *quasi in rem* jurisdiction has obviously been correctly applied by the lower federal courts in this case.

Petitioners' alleged constitutional argument under the Privileges and Immunities and Equal Protection clauses of the Constitution is equally untenable. In *Vaage* v. *Lewis,* 29 A.D. 2d 315, 288 N.Y.S. 2d 521 (Second Dep't 1968) the New York Court held that a *Seider* type attachment was not available to a non-resident on the ground of *forum non conveniens* "and also because we believe that an exercise of jurisdiction in this case would deprive the defendants of basic due process (*Hanson* v. *Denckla,* 357 U. S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283; see *Lefcourt* v. *Sea Crest Hotel & Motor Inn,* 54 Misc. 2d 376, 282 N.Y.S. 2d 896)." 29 A.D. 2d at 318, 288 N.Y.S. 2d at 525.

It is well established that a state may deny non-residents access to its Courts on the ground of *forum non conveniens,* and that such a denial does not impinge on the non-resident's constitutional rights. *Douglas* v. *New Haven R. Co.,* 279 U. S. 377, 49 S.Ct. 355, 73 L.Ed. 747 (1929); *Missouri ex. rel. Southern Railway Co.* v. *Mayfield,* 340 U. S. 1, 71 S. Ct. 1, 95 L.Ed. 3 (1950); *Minichiello* v. *Rosenberg,* 410 F.2d 106, 110 fn. 6 (2d Cir. 1968).

Based upon the foregoing, Rapidair and St. Paul submit that the petitioners herein are not entitled to an attachment of Rapidair's aircraft liability insurance policy and that the District Court was correct in vacating said attachment and the Court of Appeals was correct in affirming.

POINT III

If the attachment is allowed it would be unconstitutional as a violation of due process and as an impairment of contract.

In his opinion for the Court of Appeals for the Second Circuit, Judge Friendly left no doubt that if the New York Courts were to allow a *Seider* v. *Roth* attachment in favor of non-residents, the constitutional objections to the entire *Seider* procedure would be insuperable:

> "* * * where there are absolutely no New York contacts except for the doing of business by the insurers, we have the gravest difficulty in understanding how New York could constitutionally call upon the insureds to respond or could impair by attachment rights the insurers would otherwise have to settle with other claimants." (Pet. App. B, p. 21)
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> "For reasons sufficiently indicated in *Minichiello* v. *Rosenberg, supra,* —— F. 2d at ——, ——, slip opinions at 581-83, and 1757-58 (concurring opinion of Judge Hays), and in this opinion, we are convinced that the constitutional doubt with respect to applying *Seider* v. *Roth* in favor of non-residents would be exceedingly serious. While that may be an understatement, it would be enough to dispose of this case if the plaintiffs were nonresidents who had suffered injuries or nonresident representatives of nonresidents who had been killed." (*Ibid.* p. 22)
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> * * *
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> "The constitutional doubt arises from New York's lack of meaningful contact with the claim; a court of another state cannot supply this by picking a New Yorker as administrator of the estate of a nonresident who suffered fatal injury." (*Ibid.*, p. 23)

In the present posture of the case, this constitutional issue is not raised, since the Courts below held only that under existing New York law a *Seider* v. *Roth* attachment is not available for the benefit of non-residents. However, if this Court should review this case, and if it should decide that the interpretation of New York law was incorrect and that a *Seider* v. *Roth* attachment is available for the benefit of these petitioners, then the question of the constitutionality of the *Seider* v. *Roth* procedure is squarely raised.

We submit that Judge Friendly's dictum is fully justified, and that if a *Seider* v. *Roth* attachment is granted in favor of non-residents where there are no New York contacts except the residence of the insurers, the *Seider* v. Roth procedure as applied in this case violates the provisions of the United States Constitution.

A. The attachment violates due process.

In determining whether or not the attachment herein violates the due process clause of the United States Constitution, the Court must determine whether or not the State of New York may require a non-resident not doing business here to defend himself in New York against a claim by a resident for damages resulting from an injury occurring in a state other than New York. In determining this issue we submit that the proper test is not whether or not an attachable debt exists in New York owed to the non-resident defendant,[1] but whether New York has suffi-

1. The concept that the obligations of the insurance contract constitute a debt located in the State of New York is at best a strained concept that is apparently justified only by the rule of *Harris* v. *Balk*, 198 U. S. 215, 25 S. Ct. 625, 49 L. Ed. 1023 (1905), a case considered by many to be an anachronism in determining the situs of an intangible obligation owed by a corporation. *Minichiello* v. *Rosenberg*, 410 F. 2d 106, 120 (dissenting opinion Anderson, J.).

cient contacts with the parties and issues so that requiring the non-resident to defend in New York would meet the basic requirements of fairness and justice. *Simpson* v. *Loehmann*, 21 N.Y. 2d 305, 311 (1967); *Atkinson* v. *Superior Court*, 49 Cal. 2d 338, 345-7, 316 P. 2d 960 (1957), appeals dismissed and cert. denied *sub nom. Columbia Broadcasting System, Inc.* v. *Atkinson*, 357 U. S. 569. As Chief Judge Fuld stated in *Simpson, supra*:

> "The historical limitations on both in personam and in rem jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness. (See, e.g., *International Shoe Co.* v. *Washington*, 326 U. S. 310; *McGee* v. *International Life Insurance Co.*, 355 U. S. 220; *Longines-Wittnauer Watch Co.* v. *Barnes & Reinecke*, 15 N.Y. 2d 443). Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power." 21 N.Y. 2d at 311.

Approaching the problem from a practical appraisal of the facts we find that the only contacts that New York has with the instant lawsuit are the residency of the nominal plaintiffs and the fact that defendant's insurer has an office in the state through which it transacts business. On the other hand, the decedents were all non-residents; any recovery in the lawsuit will be for the benefit of non-resident next-of-kin; the defendant Rapidair is a Missouri corporation with its principal place of business in Missouri; St. Paul Fire and Marine Insurance Company is a Minnesota corporation with its principal place of business

in Minnesota; Rapidair's insurance policy was issued by a St. Paul agent in Illinois and delivered in Missouri; all of the other defendants are non-residents of the State of New York; the accidents occurred in the State of North Carolina; the decedents were passengers aboard an aircraft that originated its flight in Georgia, had scheduled intermediate stops in North Carolina and Virginia, and was to terminate its flight in Washington, D.C.; the travel of the decedents originated and was scheduled to terminate in states other than New York; and, as far as we are aware, none of the damage or liability witnesses reside in New York or are subject to subpoena by a New York court. With these facts it is difficult to see what interest New York has in this litigation.

Undoubtedly, the key case in determining whether the attachment herein violates due process is *Watson* v. *Employers Liability Corp.*, 348 U. S. 66, 75 S. Ct. 166, 99 L. Ed. 74 (1954). In *Watson* the Supreme Court upheld the constitutionality of the Louisiana direct-action statute in an action brought by a Louisiana resident in a Louisiana court against a non-resident's insurer to recover for personal injuries sustained in Louisiana. Both the residency of the plaintiff and the place of the accident were in Louisiana. These two factors obviously formed a sufficient basis for the imposition of the Louisiana direct-action statute. However, when the sole contact is merely the residency of the nominal plaintiff, then a state has insufficient contacts with the event to constitutionally compel a non-resident to defend itself in that state. *Hanson* v. *Denckla*, 357 U. S. 235, 253-54, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958); *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 50 S. Ct. 338, 74 L. Ed.

926 (1930); *International Shoe Co.* v. *Washington,* 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); *McGee* v. *International Life Insurance Co.,* 355 U. S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957); *Minichiello* v. *Rosenberg,* 410 F. 2d 106 (2d Cir. 1968, dissenting opinion of Anderson, J.).

B. The attachment impairs the obligation of the insurance contract.

The supplemental order of attachment herein ordered the United States Marshal to levy upon the contractual obligation of St. Paul Fire and Marine Insurance Company "to defend and indemnify defendant Rapidair, Inc. under a policy of aircraft liability insurance issued by it to said Rapidair, Inc." The United States Marshal subsequently levied on Rapidair's aircraft liability insurance policy pursuant to said supplemental order of attachment. The notice of said levy provided, in part, that the property attached could not be lawfully released except by the direction of the United States Marshal, and specific reference was made to CPLR 6214(b). This attachment of St. Paul's duty to defend and indemnify Rapidair creates certain problems that clearly impair the obligations of St. Paul to Rapidair under the insurance contract.

Condition 3(a) of the insurance policy obligates St. Paul to—

> "defend any suit against the Insured alleging such injury to person or property and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company shall have the right to make such investigation, negotiation and settlement of any claim or suit as it deems expedient;"

At the time the attachment herein was filed, St. Paul was defending, on behalf of Rapidair, six *in personam* actions brought against Rapidair in North Carolina as a result of the Piedmont-Lanseair mid-air collision over Hendersonville, North Carolina, on July 19, 1967. The total damages sought in these six actions exceeded the coverage of the St. Paul policy.

As a result of the attachment herein, it is absolutely clear that St. Paul cannot pay any sums in settlement of the North Carolina cases pending against Rapidair. CPLR 6214(b). This prohibition can be extremely prejudicial to Rapidair if settlements in these six cases could be concluded on behalf of Rapidair for sums not in excess of the policy limits.

Since the suits in North Carolina are *in personam* actions against Rapidair, any judgments over and above the insurance policy coverage could be enforced against the personal assets of Rapidair, Inc. It is clear that Rapidair has a very definite interest in seeing the North Carolina actions settled prior to trial for amounts not in excess of the coverage limits.

St. Paul is equally interested in the possibility of settling whatever suits may be pending for reasonable amounts prior to trial not only in the hope of saving a portion of their coverage but also in avoiding the expenses of trial. However, no settlements of the North Carolina cases can be concluded while the present attachment is outstanding. Clearly, then, the attachment herein does impair the obligations of the insurance contract to the detriment of Rapid-

air, Inc., and St. Paul Fire and Marine Insurance Company.

The basis for the impairment herein is the construction given to Section 5201 of the New York Civil Practice Law and Rules by the New York Court of Appeals in *Seider* v. *Roth*, 17 N.Y. 2d 111 (1966), wherein the Court held that a liability insurance policy is a "debt" and subject to attachment under CPLR 6202. This construction of the statute is reviewable under Article I, Section 10, of the United States Constitution, which states that no State shall pass any law impairing the obligation of contracts. *Columbia Railway Gas & Electric Company* v. *State of South Carolina*, 261 U. S. 236, 43 S. Ct. 306, 67 L. Ed. 629 (1923); *Houston & Texas R.R. Co.* v. *Texas*, 177 U. S. 66, 20 S. Ct. 545, 44 L. Ed. 673 (1900).

In discussing what constitutes an impairment of contract in *Columbia Railway, supra*, the Court stated:

> "The impairment of a contract may consist in increasing its burdens as well as in diminishing its efficiency. 'Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation.'" 261 U. S. at 236.

In so far as the present attachment prevents St. Paul from settling any cases other than the instant one, the attachment obviously impairs the contractual obligations of the insurance contract to the prejudice of Rapidair and St. Paul.

Although we have stated our objection in terms of impairment of contract, the validity of the attachment herein may also be viewed in due process terms. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178 (1934); *Home Insurance Company* v. *Dick*, 281 U. S. 397, 50 S. Ct. 338, 74 L. Ed. 926 (1930).

In the *Hartford* case, *supra*, the Supreme Court held that the State of Mississippi could not extend its own law to effect the rights of an insurance contract validly made in Tennessee. In holding such an extension unconstitutional as a violation of due process, the Court stated:

> "The Mississippi statutes, so contrued, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory (*Hooper* v. *California*, 155 U. S. 648; *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 565-6; *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389, 398-9); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. *New York Life Ins. Co.* v. *Head*, 234 U. S. 149; *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389, 399. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 407-8."
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> * * *
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> "* * * The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's

obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (*Home Insurance Co.* v. *Dick, supra,* p. 408), it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment." 292 U. S. at 149-150.

In light of the foregoing, it is submitted that the obligations of the insurance contract issued by St. Paul to Rapidair have been impaired by the attachment herein, and that said attachment is unconstitutional under Article I, Section 10, of the United States Constitution.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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